Tuesday, September 24, 1991

Detroit, Michigan

* * *

THE COURT: People of the State of Michigan versus Rodney Dwight Bellew. 91-5030.

MR. BIANCO: John Bianco for the People.

MR. SLAMEKA: Robert Slameka for Mr. Bellew.

MR. BIANCO: Your Honor, several of the--we can't sustain our burden over several of the felony counts because of the fact that witnesses have failed to appear. However, there are several misdemeanor counts and one felony count that I can put a case on. It will be very quick, I think that's what we will do, if it's all right with the Court.

THE COURT: All right. Now which count specifically do you not have complainants?

MR. BIANCO: We do not have the complainant on--judge, we are going to try Count I. Dismiss Count II, dismiss Count III. We are going to dismiss Count IV. We are going to dismiss--we are going to try Count V.

THE COURT: And one.

MR. BIANCO: One we are going to try.

THE COURT: Okay.

MR. BIANCO: Two, three, four, we are going to

1A

dismiss. And we are going to try five, six, seven, and eight.

THE COURT: Any objection to the dismissals on Counts II, III, IV?

MR. SLAMEKA: No, your Honor.

THE COURT: They are dismissed. You care to make an opening statement?

MR. BIANCO: No, Your Honor, we would waive opening statement.

THE COURT: Any objection?

MR. SLAMEKA: We have no objection also waive ours. I would ask that witnesses be sequestered.

THE COURT: The sequestration will apply to prosecution and defense witnesses. Witness will step outside except the first one called. They may not discuss the nature or substance of their testimony with any other witness.

GERALD ROSSO

Having been first duly sworn to tell the truth testified as follows:

DIRECT EXAMINATION.

BY MR. BIANCO

Q. State your name?

A. Detective Gerald Rosso.

Q. What is your occupation?

2A

essential duty under the Strickland test? I believe he did. It is not enough to say I don't believe the witnesses would have helped. I think he had a duty to at least investigate to determine whether or not any of the witnesses brought by the defendant would have been helped. I think he failed an essential duty in not arguing either by motion in limine or motion to suppress, that certain evidence, particularly the film in the camera be suppressed.

I find that there is or was a reasonable probability that the outcome with respect to Count I would have been different had counsel performed in a reasonably competent manner with respect to those items. I also should note, just an aside, there was no objection except for one or two places in the transcript regarding the officer's conclusion that certain things were stolen including the super 8 engine that as well contributed to the Court's determination with respect to those just cited on this record. Motion is granted in part. Denied with respect to Counts V, VI, VII, and VIII.

MR. POOKRUN: Thank you, your Honor.

MS. LEWIS: Is the Court going to proceed to sentencing on the misdemeanor count?

THE COURT: I was just about to inquire about

3A

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

RODNEY DWIGHT BELLOW,

Defendant-Appellee.

January 7, 1994

No. 157434
LC No.91-05030

Before: Jansen, P.J., and White and K. N. Hansen,* JJ.

PER CURIAM.

The prosecutor appeals as of right the trial court's dismissal, on double jeopardy grounds, of one count of receiving and concealing stolen property in excess of $100, MCL 750.535; MSA 28.803. We affirm.

Defendant was initially charged with four felony counts of receiving and concealing stolen property in excess of $100 and four misdemeanor counts of concealing or misrepresenting the identity of a motor vehicle without intent to mislead, MCL 750.415; 28.647. At trial, the prosecutor proceeded on only one felony count and all four misdemeanor counts. After a bench trial before Recorder's Court Judge Daphne Means Curtis, defendant was found guilty of all charges tried. Defendant moved for a new trial based on ineffective assistance of counsel. He was granted a new trial on the one felony count. A retrial before Judge Curtis began on June 9, 1992 and was continued to June 23.

On June 18, the prosecutor filed a motion to disqualify Judge Curtis, alleging that defense counsel was "in some way associated in the practice of law" with Judge Curtis' spouse and that Judge Curtis was under an ethical obligation to disclose this relationship. Defendant filed an answer to the motion in which he challenged the grounds for disqualification and requested that the court either dismiss the motion as unsupported or hold an evidentiary hearing. Defendant asserted that he had "substantial constitutional interests at stake," and that "the prosecutor must come forth with more than he has thus far to justify a mistrial."

At the motion hearing on June 23, defense counsel challenged the prosecutor to support the allegation that he had a business relationship with Judge Curtis' spouse. He also called the court's attention to the fact that jeopardy had already attached. The prosecutor stated that he was not sure what the business relationship was except that they appeared to share offices and someone at Mr. Curtis' phone number took a call for defense counsel. The prosecutor argued that Judge Curtis had had a duty to disclose the relationship whatever it was. The prosecutor stated that he was not asking for a mistrial but was asking that the judge disqualify herself, and "the procedural effects will have to be taken up by ... whoever gets it" upon reassignment.

Judge Curtis then explained why she had not disclosed the alleged relationship:

> Mr. Pookrum [defense counsel] is not a member of the law firm Curtis and Edison, either as a partner or an associate. He is not on Curtis and Edison letterhead but maintains his own separate, he maintains his own separate phone line or lines and maintains a straight answering service. He does not share a secretary with Curtis and Edison although phone

*Circuit judge, sitting on the Court of Appeals by Assignment.

4A

calls or a phone call may have been answered. He does not file business or for that matter personal income tax returns with any of the members of Curtis and Edison, P.C. Those are the reasons I felt, there was nothing to disclose.

The judge continued:

> To insure that each of the sides in this particular litigation feels that their rights are protected and that impartiality is assured, I shall recuse myself. This matter will be reassigned. This matter will be transferred to Judge Roberson as the Chief Judge of this court to assign it as he deems appropriate.

When asked whether she was granting a mistrial, the judge responded:

> No, I am simply referring it to Chief Judge Roberson for assignment. He will do whatever, hear any motions, or send it to the appropriate judge for hearing of motions. I am simply granting the motion filed by the People.

The attorneys appeared before Chief Judge Roberson the same day and explained that Judge Curtis had not declared a mistrial but had only disqualified herself and had left further rulings to another judge. Chief Judge Roberson expressed his view that there were potential double jeopardy problems and mentioned the possibility of sending the case back to Judge Curtis for completion of the trial. The prosecutor stated that he would be taking the position that a mistrial need not be declared and that the trial could proceed before another judge who could read the transcripts of the first day of trial. Chief Judge Roberson made no rulings but adjourned the matter for further briefing and argument.

Defendant then filed a motion for declaration of mistrial and to dismiss on double jeopardy grounds. The hearing resumed on July 28, 1992. At this hearing, the prosecutor stated that after reviewing the matter, he agreed that a mistrial should be granted. Chief Judge Roberson repeated that jeopardy had attached. The prosecutor responded that Judge Curtis should have disclosed the relationship before trial, and that her midtrial disqualification created manifest necessity for the mistrial. Defendant argued that no relationship between Judge Curtis' spouse and defense counsel sufficient to support a disqualification and manifest necessity for a mistrial was established. Chief Judge Roberson granted the motion for mistrial and postponed his decision on defendant's motion to dismiss in order to review the transcript of Judge Curtis' decision. On September 23, 1992, Chief Judge Roberson issued a written opinion granting defendant's motion to dismiss on double jeopardy grounds, explaining that there had been no showing of manifest necessity for the mistrial.

On appeal, the prosecutor does not challenge the grant of a mistrial but argues that Chief Judge Roberson erred in finding that the bar against double jeopardy required that the charges be dismissed. The prosecutor argues that there was manifest necessity for the mistrial because the appearance of impropriety required Judge Curtis to disqualify herself. The prosecutor relies on Professional and Judicial Ethics Opinions CI-605 and C-216:

> A judge is not automatically disqualified from hearing a case which is conducted by an unrelated attorney when the judge's spouse is the member of the same law office as the attorney acting in the proceeding. In such a case, the judge must disclose the relationship to all the parties to the proceeding and disqualify himself unless the parties formally request the judge to continue. [CI-605(2), (2-20-81).]

> A Circuit Judge is not automatically disqualified from hearing a case conducted by an unrelated attorney simply because a relative of the Judge within the third degree is a member of or an attorney employee of the same law firm as the attorney conducting the case. A Judge so related should disclose that relationship to all parties and raise the issue of disqualification. The Judge should disqualify himself or herself unless all parties formally request the Judge to continue with the case, in which case the Judge may do so, provided that the relative does not work directly on the case. [Formal Opinion C-216(2), (June 1979).]

4A-1

These opinions do not apply to the facts of this case. In response to the prosecutor's motion, Judge Curtis made clear that there was in fact no business relationship between defense counsel and Judge Curtis' spouse. Defense counsel was not "a member of or an attorney employee of the same law firm." For this reason, there were no grounds for disclosure, nor for disqualification.

Both the United States and Michigan Constitutions prohibit a defendant from being placed twice in jeopardy. People v Dawson, 431 Mich 234, 250; 427 NW2d 889 (1988). Jeopardy attaches in a bench trial once the first witness is sworn. People v Hicks, ___ Mich ___; ___ NW2d ___ (1993) (slip op p 1, rel'd 8-16-93). If a mistrial is declared after jeopardy has attached, the state may not bring the defendant to trial a second time unless the defendant has consented to the mistrial or the mistrial was the result of manifest necessity. Dawson, supra at 252; Hicks, supra (slip op p 2.) Although manifest necessity is not a precisely defined concept, and a trial court is afforded considerable deference in determining its application, the mere appearance of impropriety does not constitute manifest necessity. Hicks, supra; People v Little, 180 Mich App 19; 466 NW2d 566 (1989).

In both Hicks and Little, panels of this Court held that a trial court's recusal in order to avoid the appearance of impropriety effected a mistrial without manifest necessity. The Hicks Court quoted from Little:

> While we recognize the desirability of avoiding the appearance of judicial partiality whenever possible, this potential for the appearance of judicial partiality must be balanced against the deprivation of defendant's 'valued right to have his trial completed by a particular tribunal.' This valued right is more compelling where the defendant, as here, actively opposed the declaration of a mistrial. [Hicks (slip op p 2), quoting Little at 27, quoting United States v Jorn, 400 US 470, 479; 91 S Ct 547; 27 L Ed 2d 543 (1971).]

Thus, the Hicks and Little panels held that the defendants in those cases were entitled to dismissal of the charges against them on double jeopardy grounds. Hicks is binding authority under Administrative Order 1990-6, 436 Mich lxxxiv[1].

Defendant's motion to declare a mistrial, filed after Judge Curtis recused herself and transferred the case to Chief Judge Roberson, was not a waiver of defendant's right to avoid double jeopardy. Defendant vigorously objected to Judge Curtis' disqualification and challenged the grounds for the prosecutor's motion. Defendant warned that he had "substantial constitutional interests at stake" and argued that the prosecutor's showing was insufficient to justify a mistrial. When defendant filed his motion for mistrial after Judge Curtis disqualified herself, he did so together with a motion to dismiss, making it clear that he would be asserting that the consequence of the mistrial would be dismissal on double jeopardy grounds.

Our decision does not address the question whether Chief Judge Roberson could properly have sent the case back to Judge Curtis for continued trial or whether this Court could grant such relief in an appropriate case. In this regard, we observe that the prosecutor did not pursue this option in the trial court and has not requested such relief on appeal. Rather, the prosecutor has continued to insist that Judge Curtis was obliged to disqualify herself midtrial after failing to disclose the asserted relationship before trial, and that her disqualification constitutes manifest necessity for a mistrial. The prosecutor appeals only the dismissal on double jeopardy grounds and not the grant of mistrial. We hold that because the mistrial was declared without manifest necessity, the charge was properly dismissed on double jeopardy grounds.

Affirmed.

/s/ Kathleen Jansen
/s/ Helene N. White
/s/ Kurt N. Hansen

[1] Continued in effect AO 1991-11, 439 Mich xlv, and AO 1992-8, ___ Mich ___.

5A